United States Court of Appeals

for the Second Circuit

REPLY BRIEF

ORIGINAL

No. 75-4089
No. 75-4121

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
Petitioners,

and

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,
Intervenor,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,
Respondent.

B
Pls

RESPONDENT GUILD'S REPLY BRIEF.

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RESPONDENT GUILD'S REPLY BRIEF.

For the most part the issues raised in the Association's and Networks' briefs were dealt with in the Guild's opening brief. Therefore, our short reply brief is confined to some matters that were unanticipated or which require emphasis. *Florida Power,* which of course is controlling, has been adequately reviewed in our opening brief, and there is nothing in the Association's or Networks' briefs which requires further analysis.

A. That Portion of the Briefs Dealing With Strike Rules, the Form and Amount of Guild Discipline, and Other Internal Guild Affairs, Is Irrelevant to This Proceeding.

In light of the significant portions of the Association's and the Networks' briefs that are devoted to the strike rules, to the form and amount of Guild discipline, and to other internal Guild affairs, it bears reminder that these matters are irrelevant here.

Had the hyphenates been employees within the meaning of the Labor Management Relations Act rather than exempt supervisors, as they are agreed to be, *they* may have had cause for complaint if the reason for the discipline had been improper. *See, e.g., NLRB v. Industrial Shipbuilding Workers,* 391 U.S. 418 (1968) (discipline for filing unfair labor practice charge without exhausting internal union remedies). Also of possible relevance if the hyphenates had been employees rather than supervisors, would be whether the Guild sought to discipline them after they purported to resign from the organization. *See NLRB v. Granite State Joint Bd.,* 409 U.S. 213, 215-17 (1972).

But this is not such a case. The reason it isn't is because the hyphenates are admittedly supervisors. And apart from the possible affect upon the hyphenates' *employers*—an affect which, in an appropriate case, may invoke the sanctions of § 8(b)(1)(B)—there is no protection under the Act for the supervisors themselves.

Either the discipline is unlawful or it isn't. If the employers were improperly restrained or coerced by the discipline accorded to their supervisors, the discipline would equally have violated § 8(b)(1)(B)

whether it were a mere public rebuke rather than a substantial monetary penalty. Therefore, the amount of the fine, whether it was imposed upon bona fide or withdrawn members, the publicity attendant to it, as well as the other three-fourths of the matters contained in the Association's and Networks' briefs, is of no consequence in this case.

The additional reason that these matters are out of place, of course, is that they were not a charged violation [A 177].

As good (albeit tedious) reading as it makes on the issue of what did or did not happen at Guild meetings and intraunion trials, the Association's and Networks' briefs completely miss the point of this proceeding.[1]

B. Hyphenates Performed Writing Services.

The Association and Networks persist in the canard that the (a) through (h) functions do not constitute "writing," and therefore those hyphenates who crossed the picket lines and simply did this type work were not engaged in rank-and-file work. The parties' agreement specifically describes this work as "writing," and the fact that supervisors also are permitted to do it does not remove from the functions their rank-and-file character. Again, semantical problems obscure the picture because all the while they denied doing any writing, the hyphenates admitted to performing (a) through (h) functions.

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[1]Additionally, they distort the record. The fines and penalties paraded in the employers' briefs were all "drastically reduced" [A 159] or eliminated completely during internal Guild appeals, prior to the completion of the hearing before the Administrative Law Judge; no one was expelled; and no fine of five figures was levied [RX 15, 16].

Among examples in addition to those set forth in our opening brief, is the juxtaposition of the testimony by one witness that "polishing" a script constitutes an (a) through (h) function and is thus producers', not writers' work [Tr. 250/16 to 251/6], with that of a producer that *he was required to sign a writer's contract to do a polish job* [Tr. 426/2-9]. Still other witnesses, when denying that they did any writing during the strike, admitted to doing (a) through (h) work: William Roberts testified that he did nothing during the strike which in his mind constituted writing services [GCX 16 H 84/5-7], yet he also testified that he did editing and cutting [*id.*, 84/19-23], which is function (a). This editing and cutting is the type of work that can also be done routinely by writers [Tr. 391/3-8].

Whether they wrote or not, many hyphenates, in addition to those described in our opening brief, had personal writing contracts under which the employer had the authority to require writing of them [Tr. 484/24 to 486/25 (Levy, Playdon, Ranow, Strangis, Scharlach); GCX 16 H 62/24-26 (Roberts)].

C. The Board's Lately Adopted Rationale for a Violation of the Act May Not Be Used in This Case.

Just as did the Board's brief writers, the Association [Ans. Br. of Ass'n] seeks to justify the decision below in *this* case, on the basis of the rationale of later-decided Board decisions. There was only one basis upon which a violation was found here, namely, that the Guild's discipline kept the employers from utilizing the services of § 8(b)(1)(B) supervisors during the strike, not, as subsequent decisions in other cases rationalized, that the discipline would carry over to the supervisors' future § 8(b)(1)(B) functions.

That latter rationale is completely inappropriate and inapplicable on this record as far as hyphenates and their relations to rank-and-file members are concerned. Further, despite the grueling gleaning of the record by the Networks and the Association, there is no evidence of any collective bargaining or grievance adjusting functions by the hyphenates vis-a-vis writers. Those few purported examples that are cited have already been shown to be otherwise [*see* Argument C.1 of our opening brief].

This Court should follow the approved course of not "substituting Board counsel's rationale for that of the Board," *NLRB v. Food Store Employees Union, Local 347 (Heck's, Inc.)*, 417 U.S. 1, 9 (1974), since

> The integrity of the administrative process demands no less than that the Board, not its legal representative, exercise the discretionary judgment which Congress has entrusted to it. *Ibid.*

The lately adopted rationale of other cases is inapplicable to the facts here; and in any event, it is not the basis of the Board's decision.

D. If the Hyphenates Performed Struck Work, It Is Irrelevant That They Were Charged Only With Crossing Picket Lines.

The Networks contend that since the hyphenates were charged with crossing picket lines, not with performing struck work,[2] disciplining them for performing struck work would be improper. Board decisions, how-

[2]This is not strictly true because at least some hyphenates were charged with failing to perform picket duty, as well as with other strike rule infractions [GCX 16 K 33/9 to 35/10].

ever, have not been so fastidious. Regardless of the original charge filed by a union against a member, upon a determination by the Board that rank-and-file work was being done during the strike, the Board's involvement ceases irrespective of the connection or lack of connection between the charged conduct and the findings of the union's trial committee. *See United Bhd. of Carpenters, Local 14 (Max M. Kaplan Properties),* 217 N.L.R.B. No. 13, 89 L.R.R.M. 1002, 1003 (1975) (supervisor charged by union with working without steward; since supervisor did "more than a minimal amount of rank-and-file work," unfair labor practice proceeding dismissed); *Operating Eng'rs, Local 501 (Anheuser Busch, Inc.),* 217 N.L.R.B. No. 21, 89 L.R.R.M. 1012, 1013 n.4 (1975) (supervisor charged by union with "working contrary to a strike"; since supervisor did struck work, Board dismisses unfair labor practice proceeding); *see also* cases cited in note 12 of Guild's opening brief.

The initial formulation of the Guild's intraunion charge is, therefore, not the limit of the Guild's right to discipline (at least for purposes of § 8[b][1][B]). If the hyphenates could properly be disciplined, what they are disciplined for is none of the Board's business unless it is for a reason violative of public policy. *See, eg., NLRB v. Industrial Shipbuilding Workers,* 391 U.S. 418 (1968). That not being the case here, this argument by the Networks is out of place.

E. The Relief Ordered by the Board May Not Be Expanded Upon.

The Networks seek to have this Court enlarge upon the broad affirmative relief ordered by the Board. That avenue is foreclosed. *See NLRB v. Food Store Employees Union, Local 347 (Heck's, Inc.)*, 417 U.S. 1, 8-9 (1974) reversing the court of appeals decision upon which the Networks relied). In this connection, we also adopt the arguments in the Board's brief relating to the necessity for not expanding upon that relief which was ordered by the Board.

Conclusion.

For these reasons, as well as for those set forth in our opening brief, the application for enforcement of the Board's order should be denied.

Respectfully submitted,

SELVIN & WEINER,
REICH, ADELL & CROST,

By JULIUS REICH,

Attorneys for Respondent Writers Guild of America, West, Inc.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On March 31, 1976, I served the within RESPONDENT GUILD's REPLY BRIEF in re: "American Broadcasting Companies, Inc. vs. National Labor Relations Board" in the United States Court of Appeals, for the Second Circuit, No. 75-4089 and 75-4121;

on the attorneys in said action, by placing 2 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

ELLIOTT MOORE, DEPUTY ASSOCIATE GENERAL COUNSEL
NATIONAL LABOR REALTIONS BOARD, 1717 Pennsylvania Ave. NW, Washington DC 20570;
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LARRY A. CURTIS, MUSICK PEELER & GARRETT, One Wilshire Bldg., Los Angeles, CA 90017;

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 31, 1976, at Los Angeles, California

Kathleen E. Lowell

Service of the within and receipt of ~~a~~ copy thereof is hereby admitted this 31st day of March, A.D. 1976.

Copy of Service Enclosed